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No.

In the Supreme Court

OF THE

United States

SERGIUS BRYNER and FRANCIS BRYNER, et al.
Petitioners,

vs.

SECURITY PACIFIC NATIONAL BANK, COMMERCIAL BANK OF SAN FRANCISCO, CAPITAL RESERVE LEASING CORPORATION, C.I.T. CORPORATION, and LEASCO CAPITAL EQUIPMENT CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a magistrate, lacking the essential attributes of an Article III judge, may exercise the judicial powers of the United States and enter judgment in a case over which the federal court asserts subject matter jurisdiction.

2. Whether a prevailing counterclaimant, entitled to an award of contractual attorneys fees on a counterclaim, can override the "American Rule" and Congress and obtain attorneys fees that encompass not only the counterclaim but also the defense of Securities Act and other claims.

(a) Whether petitioners were denied due process of law when the magistrate aborted a scheduled hearing and entered judgment awarding respondent banks and leasing companies $2 million dollars in attorneys fees and non-statutory costs, without a hearing of any kind whatsoever.

3. Whether jury verdicts were coerced

by the magistrate's call for numerical division, followed by two supplemental Allen-type charges.

4. Whether the magistrate took the necessary steps to assure that jury verdicts were unanimous and whether, having refused to make appropriate inquiries of a questioning juror, the magistrate should have granted the application for a post-trial hearing on that issue.

5. Whether the discovery at trial that material evidence had been reconstructed or destroyed should have been the subject of sanctions that: (a) would have affected the entry of judgment, (b) would have denied an award of attorneys fees and non-statutory costs, and (c) should have been considered on the merits before entry of judgment.

6. Whether the uncontradicted facts establish a prima facie violation of the Glass-Steagall Act.

(a) Whether the trial court should have

granted respondent banks directed verdict motion.

(b) Whether a private party can assert violation of the Act as an affirmative defense.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Plaintiff and cross-defendant/appellants and petitioners herein: Sergius and Francis Bryner, Calvin and Jacqueline Benton, Clarence and Louise Copeland, Howard Daniel, Alvin and Catherine Dill, John Duff, John and Patricia Dumars, Gaar Edwards, Martin and Ruth Fish, Maurice and Ellen Fox, Gary and Karen Fry, Jared and Elsie Haight, Roy and Mary Hamaji, Robert and Betty Harrington, Ronald and Marcia Haug, Richard Jackson, Pacific Wood Preserving Corporation, Shoge and Janet Kimura, Leo and Osie Lawrence, Bernard and Barbara Lewis, Eugene and Mary Olga Liston, Lowell and Joan Lundell,

William and Marsha McKee, Philip and Rina Milano, John and Margaret Moylan, James and Nancy Ouye, Robert and Maria Pappas, Kent and Claire Pearson, Robert and Alberta Roth, Walden and Lois Alldrin, Billy Joe and Virginia Purviance, Randol and Betty Purviance.

Defendant and cross-claimant/appellees and respondents herein: Commercial Bank of San Francisco, Security Pacific National Bank, Capital Reserve Leasing Corporation, C.I.T. Corporation, Leasco Capital Equipment Corporation and defendant/appellees John Smith, William Sarsfield, Robert Temp, Alaine C. Temp, and Richard Freeman.

The individual defendant/appellees are not included as respondents in this petition.

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LEASCO CAPITAL EQUIPMENT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners respectfully file this Petition For Writ of Certiorari.

OPINIONS AND ORDERS OF COURTS BELOW

Judgments favoring respondent banks and leasing companies were entered September 18, 1981, nunc pro tunc June 23, 1981. During the pendency of the appeal from those judgments, on August 5, 1984,

the Ninth Circuit held 28 U.S.C. 636(c), of the Magistrates Act to be unconstitutional. Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), en banc hearing granted. On August 8, 1983, based upon Pacemaker, petitioners moved to vacate the district court judgments for lack of subject matter jurisdiction. On October 31, 1983, the Ninth Circuit, by memorandum (unpublished), affirmed the judgments below and thereafter stayed decision on the motion to vacate pending a decision by the court sitting en banc in Pacemaker. A petition for rehearing and suggestion for rehearing en banc was denied on January 17, 1984. On February 16, 1984, the Ninth Circuit en banc reversed the Pacemaker panel (725 F.2d 537), and on March 6, 1984, petitioners' motion to vacate judgments was denied. (See Appendix for the above-referred to orders and judgments.)

JURISDICTION

The dates of the Ninth Circuit judgments or decrees sought to be reviewed are October 31, 1983, and March 6, 1984.. The Order denying rehearing on the appeal was entered January 17, 1984. The jurisdiction of this Court to review the judgments by writ of certiorari is 28 U.S.C. §2101(c), and U.S.Sup.Ct.Rule 20.4.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows: "nor shall any person...be deprived of...property...without due process of law...".

28 U.S.C. §636(c)(1) provides, inter alia, that with the consent of the parties, a magistrate may exercise the jurisdiction of the federal court and enter judgment in any civil matter. (Appendix)

F.R.Civ.P. 60(b)(3) provides that the court may relieve a party from a final

judgment, order or proceeding for the fraud, misrepresentation, or other misconduct of an adverse party.

F.R.Civ.P. 48 requires that receipt of less than unanimous verdicts must be by stipulation of the parties.

F.R.Civ.P. 26(e)(2) provides:

> A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

12 U.S.C. §§24 and 378 provide, inter alia, that national banks shall exercise only "such incidental powers as shall be necessary to carry on the business of banking" and precludes commercial banks from directly or indirectly dealing in securities whether in the form of issuing, selling, underwriting or participating in such

activities. (Appendix)

California Civil Code §1636 provides that "a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

STATEMENT OF THE CASE

District Court Jurisdiction: Federal jurisdiction is based upon petitioners' (appellants below) claims of multiple violations of federal securities laws, the National Banking Act, and the doctrine of pendent jurisdiction. The counterclaims of respondent banks and leasing companies are for unpaid balances, interest and attorneys fees on promissory notes and equipment leases that facilitated unlawful sale of unregistered securities.

* * *

Background of the Case: Petitioners were investors in a program that collapsed despite multi-million dollar financing made possible by the respondent banks and leasing companies. The respondent banks, using the device of highly leveraged loans, linked the success of their business acquisition program to the sale of unregistered non-exempt securities. Petitioners were solicited by the promoters (D.M.S.) and referred to the respondent banks. Ordinarily, the petitioners were not customers of the banks.

The facts are unprecedented. There is no reported case in which a national bank has teamed up with sellers of unregistered securities to obtain new business. The offer of 100% leverage, through unsecured loans prearranged by the promoters was a major inducement for investors to enter the program. The banks, through the conduit of promoter-recruited California borrowers,

provided capitalization for Texas operators and they utilized promoters' income projections to structure investment loans.

Loan proceeds, earmarked for the Texas operators, were disbursed from ad hoc special accounts. Interest income to the banks was maximized through a "roll-over" feature, resulting in prepayment of 4-year notes after one year and applying the "rule of 78s."

The program's major financing was offered by respondent Security Pacific National Bank, which provided loan proceeds totaling over $9.5 million dollars. In their defense, the banks contended that these were "ordinary commercial loans." At mid-trial it was learned that original loan files (which were the most basic proof of whether these were "ordinary commercial loans") had either been destroyed or disassembled and new files created for litigation purposes. Similarly, it was learned that

all the originals of the most important historical document in the bank file (credit commitment reports) had been destroyed and that the bank had altered and used paste-ups to create copies and obscure the destruction of originals.

In late 1974, with the program was in a state of collapse, respondent Commercial Bank of San Francisco, employing the identical officers who had operated the program at Security Pacific, attempted to salvage the program by providing fresh capital in the form of new loans to old investors and separate loans to the promoters/operators.

The respondent equipment leasing companies had contracted to deliver equipment to the site of oil and gas wells, but their records do not establish delivery of such equipment, or even its existence. Their counterclaims hinged on the efficacy of "receipts" executed by absentee investors who relied upon representations of the

promoters. The fate of the promoter/operators of this program is set out in United States v. Freeman, 619 F.2d 1112 (5th Cir. 1980), cert.denied 450 U.S. 910 (1981).

* * *

Reference to A Magistrate: Complaints and cross-complaints were separately filed in 1976 and 1977 and, thereafter, consolidated for trial. Prior to the 1979 enactment of 28 U.S.C. §636(c), the parties consented to reference to a magistrate pursuant to §636(b). Before trial commenced on July 28, 1980, the parties consented to the magistrate's exercise of jurisdiction under 636(c).

* * *

Destruction of Material Evidence: In the course of trial, it was learned that respondent Security Pacific National Bank had destroyed, altered, and otherwise mishandled material evidence. The bank's misconduct was a subject of post-trial motions for

judgment n.o.v. and new trial. F.R.Civ.P. 59, 60(b)(3). ER 50, §V. The motions were denied without a hearing on the merits. ER 75, 78. The Court of Appeals memorandum (Appendix) is silent on this point although it is squarely raised. See Appendix, p.1, infra, Issue No. 3.

The first disclosure of the banks' misconduct was made on February 5, 1981, seven months after the commencement of trial when the bank's lead counsel told the court "original files...don't exist any more", and that the bank had "created a file" purporting to consolidate documents retrieved from throughout the bank. RT 15714-15. Nine of sixteen main office files had been destroyed and of the seven produced, financial documents were missing. The remaining loan files had been disassembled and placed in a litigation file with other documents characterized after the trial as "reconstructed" files.

ER 59. All were passed off as individual loan files kept by the bank in the ordinary course of business.

Original "credit commitment reports," the historical document setting out "what actually happened" had been destroyed and replaced with photocopies. RT 17070, 18237.

The bank altered original credit commitment reports by whiting out, masking, and utilizing "paste-ups", and then photocopying the paste-up, a practice that makes the photocopy appear to be a copy of an original instrument, when it is not. RT 15529-30.

From early 1976, Security Pacific was aware that its participation in the investment program was a subject of civil litigation and SEC scrutiny. As early as 1973, the bank foresaw litigation. Pl.Ex.95-2.

In 1976, when the first lawsuit was filed, a vice president took charge of collecting the original loan files (RT 17064) "and gathering bank documents

for production to attorneys for the plaintiffs." ER 59, RT 14988, 17065-70.

Over half the Main Office files could not be produced during the 1980-81 trial because they had been totally destroyed and of the seven produced, important financial documents were missing. Insofar as the San Mateo branch files were concerned, Security Pacific, instead of maintaining those files in their original condition, disassembled and "reconstructed" them. ER 59, RT 17069. "We put this file together on January 12, 1976." RT 17073. The bank did this by removing the documents from the loan file and creating a new file that purported to include documents from other departments of the bank without inventorying what was in the original file, thereby making it impossible to know whether the "reconstructed" file contained everything that was in the original loan file. RT 17074-5.

Throughout pre-trial and discovery proceedings and for seven months into trial, Security Pacific talked about individual loan files without disclosing that, before they had been produced for inspection and copying, they had been "reconstructed." On February 15, 1979, (CR 940) the bank's attorney marked three credit commitment reports as exhibits and, forestalling a call for the original, stated:

> I shall represent to you that those were photocopied in our office from the branch credit file...of Security Pacific. CR 940 at pp.659-660.

There were no originals. RT 17076, 18237.

In a request for production of documents, filed August 17, 1976, petitioners demanded production, inter alia, of complete loan files, etc. The bank's response was that production would be burdensome but there was no acknowledgement that "complete loan files" did not exist.

In answers to interrogatories dated

November 23, 1977, (CR 164) the bank repeatedly referred plaintiffs to "individual loan files of the borrowers" for answers to specific requests for information.

An exchange of interrogatories in September, 1977, generated the following Security Pacific responses:

> Security Pacific has produced the individual loan files of the borrowers...the answers to these interrogatories may be derived or ascertained from an examination of the loan files... (Answer to Interrogatory 1, 11/23/77, CR 164)

When the bank was asked to identify and describe all documents received as a result of the promoters efforts, the bank responded by stating "see the individual loan files" (Answer to 4E 11/23/77, CR 164) Similarly, when the bank was asked to identify and describe the purpose of each loan, the bank responded "see the individual loan files". (Interrog. Answer 5B, 11/23/77, CR 164)

Thus, the bank consistently parried

requests for specific information with the rejoinder that petitioner should "see the individual loan files which have been produced for inspection and copying", but never bothered, until four years later, late in the trial, to tell anyone that "the individual loan files" had been tampered with and that the files produced had not been maintained in the ordinary course of business. Rather, they were assembled for a self-serving litigation purpose. RT 17069.

On July 2, 1980, more than three weeks prior to commencement of trial, separate trial subpoenas duces tecum were served on Security Pacific's main office and the San Mateo branch. CR 1275, 1346. The subpoenas required production at trial of "all loan files", etc., and the subpoena footnoted that summaries would be acceptable: "except as to the complete original loan files." But, it was not until

February 5, 1981, seven months into trial and five years after the first lawsuit had been filed that Security Pacific acknowledged that "complete original loan files" no longer existed and the bank had "created a file" which it had referred to throughout as "the individual loan files." RT 15714-5.

In affidavits filed in response to petitioners' post-trial motions on this point, respondent bank equated "original loan files" with what they only then began to refer to as reconstructed or Special Asset Department files. The bank told the court that plaintiffs' counsel:

> Were given an opportunity to inspect all original loan files which could be located for each plaintiff, i.e., the files as reconstructed by Security Pacific's special assets department when it took over the plaintiffs' loans from the lending branches. (Cross Decl. ER 59, ¶2, emphasis added.)

In petitioners' post-trial motion

raising this point they attach several declarations, including their former lead counsel who superintended the discovery process. He averred:

> Throughout my participation as an attorney of record in this litigation, the bank maintained in its defense to alleged securities law violations that it had made ordinary commercial loans based upon the personal income and net worth of individual borrowers and not to enhance the capitalization of the mineral lease program. The loan files purportedly confirmed this position. Had I, as attorney for plaintiffs, known that the loan files had been 'reconstructed' by Security Pacific National Bank, I would have insisted upon seeing the loan files in their original condition, as maintained in the branch in order that I could see exactly what the branch had in its file, when it approved the loan, and thereafter. The apparent mixing of documents from the branch loan file with documents from other parts of the bank, resulting in a reconstructed or composite file, changed the character of what had been asked for and was led to believe I was receiving. (Brotsky Decl. ER 73, ¶9)

Five attorneys, who represented various

of the plaintiffs during the discovery process, provided declarations, all of which agree on the following points: (1) That Security Pacific had purported to produce original loan files; (2) That Security Pacific had never referred to the loan files as "Special Asset Department files"; (3) That Security Pacific did not disclose that any of the loan files had been "reconstructed" or that several main office loan files were missing; and (4) That Security Pacific did not disclose that the original credit commitment reports had been destroyed. (See Brotsky, Mendelson, Avansion, Logan, and Pedder declarations. ER 73.)

On January 27, 1976, while the bank was preparing for litigation, it circulated a memorandum to employees (Pl.Ex.95-23) directing anyone with knowledge of inquiries or transactions involving the program to contact the same bank officer who had

collected the loan files. The memorandum directed the recipient to "DESTROY" the circular after reading and following its instructions. The word "destroy" is capitalized. Pl.Ex.95-23.[1/]

* * *

Jury Coercion and Lack of Unanimity: On May 13, 1981, the jury sent a written communication to the court:

> We cannot agree on a number of significant points and see no possibility that we will ever agree. Request No. 7, CR 1703, RT 21944.

1/ The bank had no reluctance at all to falsify documentation. In the Dole/Edwards transaction, the bank backdated a promissory note to make it appear that the original obligor on an $110,000 loan was the promoters rather than Dole and Edwards. As it turned out, the $110,000 loan had been to Dole and Edwards who had signed a promissory note. When Dole and Edwards defaulted, the bank destroyed their note and their loan file and substituted the promoters as if they were the original obligors. The vital credit commitment report, which would have recited the facts of the transaction and all other supporting documentation relating to the granting of the original loan destroyed. RT 16222, 16239-40. The backdating of the note and re-writing of history with respect to the 1973 Dole/Edwards loan is a violation of 18 U.S.C. §1005, a felony.

The trial court, upon being advised that the jury was deadlocked and could not reach a verdict (RT 21944), inquired about numerical division. RT 21945. When advised by the foreman that the jury was divided 4 to 2 on some issues and 5 to 1 on others, the court sua sponte gave an Allen-type charge, prefaced by remarks concerning the length and cost of the trial. RT 21946-51. Shortly thereafter, the court was advised that there was one "uncooperative" juror. RT 21959. Without consulting counsel, the court gave a second Allen-type instruction, referring to, and rebuking, without identifying, the hold-out juror. RT 21959-62. The court then excused the jury for four and one-half days to reflect on the impasse. RT 21961-2. Immediately after reconvening, the jury began to return verdicts. CR 1750.

After all thirty-three verdicts had been read the jury was polled. RT 21982.

The "hold-out" juror who had been upbraided by the court stated that his "yes" vote was "in order to get a unanimous vote." Id. Without further inquiry, or requiring further deliberations, the trial judge, in open court, insisted upon a "yes" or "no" answer. RT 21985. Despite three requests from petitioners' counsel (RT 21984, 21985, 21986), the court refused to inquire of the juror about the meaning of his statement, or whether his ultimate affirmation reflected a conscientious conviction as to the weight and effect of the evidence. Id.

The jury was discharged over the objection of petitioners' counsel. RT 21986. Motions for new trial based on coercion (ER 50) and for an evidentiary hearing on juror unanimity (ER 64) were denied (ER 75, 81).[2/]

2/ In its memorandum, the court of appeal erroneously states that the issue is raised for the first time on appeal. Appendix.

When the magistrate excused the jury for 4½ days he told them that he "trusts that I will have no more of this sort of, what I classify as, nonsense." RT 21962. After the jury had departed, he addressed counsel:

> Now, I'll state for the record. I don't feel I need advice of counsel to fuss at a jury, so I didn't discuss this with you ahead of time. I wanted to have an opportunity to tell them what I think, and to tell them unaffected by the thoughts of attorneys. RT 21962

* * *

The Award of Contractual Attorneys Fees Encompassed Respondents' Defense of Securities Act and Other Claims, and was Assessed Without A Hearing:

On July 9, 1981, Security Pacific National Bank formally noticed a motion for attorneys fees for hearing on August 7, 1981. Petitioners had previously filed post-trial motions for judgment n.o.v., and new trial, and, by letter dated July 6, 1981, requested a hearing on all post-trial motions. CR 2037.

On July 10, 1981, the magistrate informed counsel that he would "hear oral argument...on August 28, 1981, commencing at 9:30 a.m." CR 1868, emphasis added.

On August 14, 1981, the court distributed an agenda that included attorneys fees as an item for the August 28 hearing, reiterating that "motions...will be heard at 9:30 a.m. on August 28, 1981..." CR 1871.

For unexplained reasons, when Court convened on August 28, 1981, instead of the promised hearing and oral argument, the magistrate handed out orders that included approximately $2 million dollars in attorneys fees and non-statutory costs, all without a hearing. The orders are silent on California law which controlled. See Orders 9, 10, 11 (Appendix). In the course of the 8/28 proceeding, the magistrate told counsel that he had communicated ex parte with "various lawyers who authored parts of these briefs" and had thereby resolved

"whatever the confusions there were." Consequently, said the Court, "oral argument will not be either required or permitted."[3/] RT 2, 8/28/81.

* * *

The Respondent Banks' Violations of The National Bank Act Constitute An Affirmative Defense To Bank Counterclaims and the Court Should not Have Directed a Verdict for Respondent Banks: Appellants' interposed affirmative defenses to bank counterclaims alleging violation of the National Bank Act (Glass-Steagall) 12 U.S.C. §§24, 378. The banks' directed verdict motions were granted. ER 39.

3/ One result of the failure to conduct a hearing is the disparity in attorneys fees awarded arbitrarily on an undifferentiated basis with punitive effect. Petitioner Moylan was sued for $15,359, yet $47,578 was assessed against him as attorneys fees. Petitioner Lawrence was sued for $252,828 and he was assessed $47,578. Petitioner Pappas was sued for $16,527 plus interest, yet he was assessed $62,831 for fees and costs. 75% of the judgment against Pappas and others is allocated to attorneys fees and costs while petitioners such as Lawrence, with far more complex transactions, are in an opposite position with less than 20% allocated to attorneys fees and costs. There are numerous other such examples.

The material facts are uncontradicted. In each and every instance, the banks' loans were "to make available funds for investment and programs of D.M.S." Pl.Ex.95-2, (Appendix). According to an affidavit prepared by a bank officer, all D.M.S. loans were "with the understanding that the proceeds of the loans would be used by the customers to purchase and re-work mineral leases as tax shelter investments." SP Exhibit 1958.

The banks knew that the D.M.S. program it was financing was a security. RT 16792, 15047. A senior vice president warned that the bank was facilitating investments and would one day be sued. Pl.Ex.95-2 (Appendix). Earmarked loan proceeds provided 100% leverage for the investment and also provided the consideration for the unlawful sale of unregistered securities. RT 16957; Pl.Ex.95-6. Security Pacific consummated

over $9 million dollars in unsecured bank loans (Pl.Ex.95-11) to non-customers (RT 16295) over a two-year period.

The bank admits that the success of its business acquisition program depended upon the sale of securities. RT 15691. Pl.Ex.95-2. A Security Pacific memorandum acknowledges that the bank's "willingness to make available funds for investment and programs of diversified monetary systems connected [the bank] irrefutably in the mind of the borrower with Diversified Monetary Systems... protestations to the contrary notwithstanding." Pl.Ex.95-2, emphasis added.

Security Pacific considered the D.M.S. investment program a marketing vehicle (RT 16108) and "a means to an end." Pl.Ex.95-7. Bank officer Sarsfield said that the program was "an interesting way to obtain the accounts" of new customers. RT 15690. Sarsfield had advised Security Pacific's senior vice

president of the bank's participation in the program "to make sure he was aware of this potential way of developing the accounts [for] the bank." RT 15722. The bank saw it as an opportunity "to develop contacts, particularly with the medical profession by "financing...their...investments." RT 15722. As bank officer Sarsfield testified:

> What we are trying to do is get in contact with doctors without having to go out and knock on every door of every physician in the City of San Francisco. RT 15729.

Sarsfield found the sale of tax shelters to be "an interesting vehicle to increase [bank] business" (RT 15691) and the bank's highest officers looked upon it as a "business acquisition program." Pl.Ex.95-2. Its success was entirely dependent upon the unlawful sale of unregistered securities.

* * *

AUTHORITIES IN SUPPORT OF, AND AMPLIFICATION OF REASONS RELIED ON FOR, ALLOWANCE OF THE WRIT.

1. No person lacking the essential attributes of an Article III judge may exercise the judicial power of the United States: On August 5, 1983, a Ninth Circuit panel held that consensual delegation of powers to a magistrate, pursuant to 28 U.S.C. §636(c) was unconstitutional. Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305. On August 8, 1983, petitioners, in reliance upon Pacemaker, asked the Ninth Circuit to vacate the instant judgments for lack of subject matter jurisdiction. That motion was taken under submission pending a decision by the circuit sitting en banc. On February 16, 1984, the Ninth Circuit sitting en banc reversed the Pacemaker panel. 725 F.2d 537, and on March 6, 1984, petitioners' pending motion

to vacate judgments was denied.[4/] It should be noted that six of the fourteen votes cast in the Ninth Circuit on this issue favor a holding that Section 636(c) is unconstitutional. (The unanimous Pacemaker panel and three dissents on the en banc court.)

The issue is now recurrent and will persistently arise in the district courts and courts of appeal until this Court resolves the question. This is particularly so in view of Court's decisions in Crowell v. Benson, 285 U.S. 22 (1932); United States v. Raddatz, 447 U.S. 667 (1980); and Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), a trilogy that establishes an ineluc-

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4/ Three other circuits, the First, Second and Third, have upheld the constitutionality of 636(c). See Wharton-Thomas v. United States, 721 F.2d 922 (3rd Cir. 1983); Collins v. Foreman, 83-7938, 52 LW 2511 (2nd Cir. 2/22/84); Goldstein v. Kelleher, 83-1411, 52 LW 2511 (1st Cir. 2/29/84).

table constitutional principle.[5/]

The identical issue arises in any one of several contexts. For example, in United States v. Woodley, ___ F.2d ___, Slip Op.5730 (9th Cir. 12/8/83) the same principles, upon which the Pacemaker panel relied were applied to a recess appointment to the federal judiciary. The rationale supporting Woodley is compromised by the decision of the en banc court in Pacemaker, and Woodley conflicts with a 1962 Second Circuit decision on the same issue. United States v. Allocco, 305 F.2d 704 (2nd Cir. 1962). Allocco resolves the issue on pragmatic, rather than jurispru-

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5/ This constitutional question falls within Supreme Court Rule 17.1(c) governing review on certiorari, i.e., "when...a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court."

dential, grounds.

In Woodley, supra, the court of appeals put the question thusly:

> Whether a person lacking the essential attributes of an Article III judge -- life tenure and protection against diminution of compensation -- may nonetheless exercise the judicial power of the United States..." Slip Op.5730.

Woodley is premised on the proposition that Section 1 of Article III entitles "only judges with Article III protection [to] exercise the judicial power of the United States." Slip Op.5732. Life tenure and guaranteed compensation are "the essential attributes of an Article III judge" (Slip Op.5731), and are indispensable to judicial independence which is the hallmark of an Article III judge. Clearly, a magistrate does not fit that description. Indeed, the Woodley court, as did the Pacemaker panel and the en banc dissent, rely entirely upon decisions of this Court which have consistently "emphasized the overriding

importance of an independent judiciary." Slip Op.5736.

In Evans v. Gore, 253 U.S. 245, 253 (1920), this Court held:

> Independence of action and judgment is essential to the maintenance of the guarantees, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. 6/

The recent opinions of the First, Second, Third and Ninth Circuits, supra fn.4, upholding the constitutionality of Section 636(c), tilt heavily toward pragmatic concerns in order to sustain a practice permitting a person who lacks the attributes of an Article III judge to exer-

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6/ This pronouncement seems particularly apt in a case such as this in which a magistrate has entered judgment against private litigants in favor of the State's third largest bank (one of the Nation's ten largest) without prior review or supervision of an Article III judge, after eschewing hearings on attorneys fees, destruction of evidence and juror unanimity, and on all post-trial motions.

cise the judicial power of the United States by entering judgment in cases over which the federal courts have subject matter jurisdiction.

In Glidden Co. v. Sdanok, 370 U.S. 530 (1962) and Northern Pipeline, supra, 458 U.S. 50, this Court held unconstitutional statutory schemes designed to promote judicial efficiency. Section 636(c) is an expedient that, more often than not, is forced upon litigants and should fall of its own weight in accord with decisions of this Court.

In I.N.S. v. Chadha, 458 U.S. 1120 (1983), 103 S.Ct. 2764, 2781, this Court held that "convenience and efficiency are not the primary objectives--or the hallmarks of democratic government..." In Woodley, supra, the Ninth Circuit found that:

> The teaching of Chadha is clear. Historical acceptance and governmental efficiency are not unimportant. They will not, however, "save [a practice] if it is contrary to the Consti-

> tution. " Slip Op.5741 quoting Chadha, 103 S.Ct. at 2781.

The dissent to the Ninth Circuit en banc decision in Pacemaker concludes that the majority:

> Disrupts the proper operation of our constitutional system including the independent exercise of judicial power by individuals free of outside constraints... 725 F.2d 547.

The dissenters, as did the original Pacemaker panel, 712 F.2d 1305, concluded that the exercise of the judicial power of the United States by Article III judges cannot be allowed to depend upon stipulations of the litigants. 725 F.2d 547, 548-553.

In United States v. Raddatz, 447 U.S. 667 (1980), this Court suggests the limits of a magistrate's delegated authority holding that delegation in that case (permitting a magistrate to conduct an evidentiary hearing on a suppression motion) did not violate Article III "so long as the

ultimate decision is made by the district court." 447 U.S. at 683, emphasis added. Thus, in the instant case, the ultimate decision on issues raised in the post-trial motions which were threshold to the entry of judgment, should have been made by an Article III judge.[7/]

The original Pacemaker decision, supra, the dissent to the en banc decision, supra, and Woodley, supra, decision are all in accord with this Court's decisions in the Crowell, Raddatz, Northern Pipeline

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7/ Petitioners do not agree with the additional dissent of Judge Pregerson, 725 F.2d 556-557. There is no justification for extending Article III protections to magistrates. If we need more Article III judges then they should be appointed, but the assumption that magistrates are qualified to exercise Article III powers is unsupportable. The case below, for example, was a judicial shambles, the magnitude of which is obfuscated by a court of appeals "memorandum" that omits most of the material facts (limited to two paragraphs) and neglects to discuss in any depth the issues raised on appeal. This Court should see through that memorandum which implicitly sanctions such "a departure by a lower court from the usual course of judicial proceedings" as to call for "an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a).

trilogy. The Ninth Circuit's en banc decision in Pacemaker is not. This Court has never deviated from the constitutional principle that Congress may not delegate power that properly belongs with Article III judges (even if Article III judges are willing to permit that to happen). When the delegation includes the ultimate power to make final decisions, the Constitution mandates that such delegation be annulled.

2. The magistrate's award of attorneys fees and non-statutory costs was contrary to law and denied due process of law: The magistrate's award of $2 million dollars attorneys fees and non-statutory costs that paid for respondents' defense of securities act claims. Such an award offends controlling principles established by this Court and the Supreme Court of California. The issue falls within Supreme Court Rule 17.1(c) in that a federal court of appeals has decided an important question of law

which has not been, but should be, settled by this Court, and has decided a federal question in a way that appears to conflict with applicable decisions of this Court.

Attorneys fees may not be awarded in securities act litigation absent a finding that such litigation was undertaken in bad faith, or was meritless. Junker v. Crory, 650 F.2d 1349, 1364-5 (5th Cir. 1981).[8/] An award of contractual fees requires that a court ascertain the intent of the parties when they entered the contract. Pacific Oil & Cement Co. v. Food Machinery Chemical Corp., 178 F.2d 541, 552 (9th Cir. 1949); Calif.Civ.C. §1636. A trial court shall exercise its discretion in accord with equitable principles United States v. Mountain State Construction Co., 588 F.2d 259, 263 (9th Cir. 1978); Krause v. Rhodes, 640 F.2d 214, 218, 220 (6th Cir. 1981);

8/ No such contention has been or could be reasonably asserted in this case.

shall consider national policy Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964), and the public policy of the State of California. Ecco-Phoenix Electric Corp. v. Howard J. White, 1 Cal.3d 266, 272 (1969).[9/]

In the instant case, the trial court and the court of appeals ignore all of the above, pushing to one side threshold questions of contract interpretation, equitable considerations, public policy, pertinent provisions of the securities acts, and due process of law. In lieu of the exercise of discretion, staggering attorneys fees and non-statutory litigation costs, amounting to punitive damages, have been awarded the banks and leasing companies without a hearing.

9/ The Ninth Circuit memorandum concedes that this is the law, but does not apply it to the magistrate's refusal to conduct a hearing or to exercise discretion under California law. The magistrate's post-trial Orders 9, 10, 11 (Appendix) are silent on California law and ignore what the Ninth Circuit memorandum refers to as California's "flexible approach".

Under California law, it is the parties' intent, at the time they enter into a contract, that controls:

> It is the aim of courts, in interpreting a written contract, to give the effect to the mutual intention of the parties as it existed at the time of the execution of the contract. Pacific Oil & Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541, 552 (9th Cir. 1949).

The standard, says the Ninth Circuit quoting Judge Learned Hand, is "what a normally constituted person would have understood [the words] to mean, when used in their actual setting." Id.

In Krause v. Rhodes, supra, the Sixth Circuit emphasizes the "broad equity powers" of a federal judge to control an award of fees authorized by contract and holds:

> That what was in the first instance a fair contract becomes unfair in its enforcement" and that "however reasonable and appropriate, the instant fee contracts were, when signed, the situation now existing differs drastically from that which the contracting parties originally contemplated. 640 F.2d at 220, emphasis added.

The magistrate ignored opinions of California's highest court interpreting contracts in accord with public policy and recognizing "the oppressive nature of a literal interpretation" of a fee provision. Ecco-Phoenix Electric Corp. v. Howard J. White, Inc., supra, 1 Cal.3d at 272.

In International Industries, Inc. v. Olen, 21 Cal.3d 218 (1978), the California Supreme Court reaffirmed that equitable principles and policy considerations that underlie judicial interpretation of attorneys fees clauses. 21 Cal.3d at 223-4. In Sciarrotta v. Teeford Construction Co., 110 Cal.App.3d 444 (1980), the California Court of Appeals, citing International Industries, Inc., supra and Ecco-Phoenix, supra, noted:

> The Supreme Court has taken a more narrow view of attorneys fee clauses precisely because of the possibility that litigation might ensue for its own sake if a simplistic and inflexible con-

> struction of attorneys fees clauses is followed. 110 Cal.App.3d at 451, emphasis added.

The instant case reveals the other side of the same coin, i.e., that a "simplistic and inflexible construction of attorneys fee clauses" has a chilling effect on bona fide litigation. See Schaulis v. C.T.B./McGraw Hill Inc., 496 F.Supp. 666, 680 (N.D.Cal. 1980). "To do so in this context could only chill individual litigants..."

The central holding of Sciarrotta is that "an attorneys fee provision in a form contract must be limited to the actions included in that clause" 110 Cal.App.3d at 450. California does not permit an interpretation of a fee clause "that could not have been reasonably contemplated or intended by the parties at the time of

contracting." 110 Cal.App.3d at 452, accord Krause v. Rhodes, supra, 640 F.2d at 218, 220. No attempt was made by the magistrate to interpret the fee clause or even consider the contemplation of the parties at the time they entered the contract.

To cast upon petitioners the burden of compensating respondents banks' and leasing companies' attorneys for conducting a defense against bona fide securities act claims is against federal policy and will unquestionably chill private litigants who have bona fide securities act claims involving economically powerful financial institutions.

(a) The award of attorneys fees and non-statutory costs, without a hearing, denied petitioners due process of law: This point is raised on appeal (see Appendix, p.1) but is ignored in the Ninth Circuit

memorandum.[10/] Appellants requested a hearing on all post-trial motions. CR 2037. Respondent Security Pacific's fee application set a hearing date of August 7, 1981. ER 54. The Court reset a hearing for August 28, 1981, on all post-trial motions and circulated an agenda that included attorneys fee motions. However, on August 28, the magistrate stated that he had communicated ex parte with "various lawyers" (not including petitioners) and had resolved "the confusions". RT 2, 8/28/81. He then entered judgment noting that "oral argument will not be either required or permitted." Id.

The controlling principle is set out by this Court in Perkins v. Standard Oil of California, 399 U.S. 222 (1969) holding

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10/ The Ninth Circuit states that it does not discuss certain points on appeal because, though "not lacking in merit", they are "not pivotal." (Memorandum, Appendix) How can an award of $2 million dollars constituting 40% of the total judgment awarded without a hearing and applying an erroneous standard; be "not pivotal"?

that attorneys fees should be "fixed in the first instance by the district court, after hearing evidence as to the extent and nature of the services rendered." 399 U.S. at 223, and, in this case we would add, interpreting the contract in accord with federal policy and California law. In Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980), the Ninth Circuit applied the Perkins principle by remanding the attorneys fee issue to the district court "for the purpose of determining the appropriate counsel fee to be awarded, subsequent to an evidentiary hearing." 630 F.2d at 677, emphasis added. In Cook v. Ochsner Foundation Hospital, 559 F.2d 270, 273 (5th Cir. 1977), the court of appeals refers to the necessity for a "due process" hearing followed by "specific findings and conclusions" which set forth the basis of the trial court's ruling. Emphasis added. In Lindy Brothers Builders, etc. v. American Radiators, etc.,

487 F.2d 161 (3rd Cir. 1973), citing this Court's dictum in Perkins, supra, the Third Circuit concludes that the failure of the trial court to hold an evidentiary hearing was "inconsistent with the sound exercise of discretion." 487 F.2d at 170.

In City of Detroit v. Grinnell Corp., 495 F.2d 448 (2nd Cir. 1974), the Court of Appeals, also citing Perkins, holds that a fee award should be fixed by the district court "after hearing evidence as to the extent and nature of services rendered." 495 F.2d at 472.[11/]

In King v. McCord, 621 F.2d 205, 206 (5th Cir. 1980), the Fifth Circuit, also citing Perkins, holds that "appellants

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11/ In Grinnell, the trial court had followed a procedure strikingly similar to what occurred in the instant case. After notifying the parties that a hearing was to be held, the Court limited the hearing to oral argument, not allowed by the trial court in the instant case. 495 F.2d at 472. The court characterizes an evidentiary hearing "complete with cross-examination [as] imperative." 495 F.2d at 473.

should have been provided an evidentiary hearing to resolve the disputes and supplement its insufficient affidavits." Unimpressed with the trial court's order as "nothing more than a ceremonial obedience to Johnson," The court held that the manner in which these elements influenced the attorneys fee award must be elucidated by the trial court."

> Attorneys fee awards should not be based on the arbitrary and conclusionary predispositions of the trial judge. The failure of the district court to hold an evidentiary hearing in this case was inconsistent with the exercise of sound judicial discretion. 621 F.2d 206, emphasis added.

In Davis v. Fletcher, 598 F.2d 469 (5th Cir. 1979), the court emphasizes the necessity for assuring that fee awards are "based upon appropriate standards" and are not simply "a meaningless exercise in parroting and answering each of Johnson's twelve criteria." 598 F.2d at 470-71, emphasis added.

In the instant case, "appropriate standards" for the award of contractual attorneys fees were ignored and the Ninth Circuit's reliance upon Wagner v. Benson, 101 Cal.App.3d 27 (1980) in its memorandum opinion is misplaced. Wagner, decided by an intermediate appellate court does not cite Ecco-Phoenix, supra, or International Industries, supra, and either totally ignores the principles enunciated by the California Supreme Court in those cases or sub silentio followed those cases by determining that the action against a note-holding bank was meritless. Otherwise, Wagner v. Benson is inconsistent with Ecco-Phoenix and International Industries.[12/]

12/ The Wagner opinion suggests as much by implying that plaintiffs did not have a prima facie claim. 101 Cal.App.3d at 35. Sciarrotta, supra, decided nine months after Wagner cites both Ecco-Phoenix and International Industries and exercises discretion against a "literal and inflexible interpretation of attorneys fee clauses" where the result would be "contrary to public policy..." 110 Cal.App.3d at 451, emphasis added.

It is noteworthy that Wagner does not cite Ecco-Phoenix or International Industries.

3. The jury verdicts were coerced: Inquiry about the numerical division of a deliberating jury is plain error. United States v. Noah, 594 F.2d 1303, 1304 (9th Cir. 1979). In Brasfield v. United States, 272 U.S. 448 (1926):

> Such procedure serves no useful purpose...its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or the appellate courts and may vary widely in different situations, but in general its tendency is coercive. 272 U.S. at 450.

In Brasfield, this Court held that "the inquiry itself should be regarded as ground for reversal." Id., emphasis

added.[13/] This question falls within the purview of Supreme Court Rule 17.1(a), and (c).

Even without an inquiry about numerical division of the jury, the giving of a single Allen charge, without more, stands at the brink of "impermissible coercion." United States v. Seawall, 550 F.2d 1159, 1163, n.8 (9th Cir. 1977) and it has been the law of the Ninth Circuit (ignored here) since Seawall that having given it once, the trial judge "may not repeat the Allen charge or ask minority jurors to re-examine their standing." 550 F.2d at 1163-4, n.11. See also Iverson v. Pacific American Fisherie, 73 Wash.2d 973, 442 P.2d 243 (1968).

The Ninth Circuit said in Seawall that "problems arising from the inherently

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13/ The Ninth Circuit memorandum implies, without holding, that a different test may apply in a civil case. No court has so held and no reasoning will support such a conclusion.

coercive effect of the Allen charge have caused other courts of appeal and state courts to prohibit or to restrict severely its use", and that, given a second time, "it becomes a lecture sounding in reproof." 550 F.2d at 1162-3. In the instant case, the "reproof" explicit in the magistrate's remarks to a minority juror is striking. RT 21961-2.

In United States v. Rogers, 489 F.2d 433, 436 (4th Cir. 1961), the court found that the kind of procedure the magistrate utilized here "may readily be construed by those jurors in the minority as requiring a deferential surrender to the views, however unreasoned, of the majority." In Kesley v. United States, 47 F.2d 453, 454 (5th Cir. 1931), the court holds that "comments, not upon the evidence but reflecting on the jurors, are not permissible":

> Because of the imputation of stubbornness or worse which is likely to arise if the numerical division of the jury is publicly

> revealed, to require disclosure of it is held error per se in the courts of the United States. Brasfield v. United States, 272 U.S. 448. Much more serious is an imputation by the judge that some of the jurors are forgetting their oaths. 47 F.2d at 454, emphasis added. 14/

The Ninth Circuit memorandum incorrectly states that the coercion issue was raised for the first time on appeal. (Appendix) The issue was squarely raised in the trial court in motions for judgment n.o.v. and new trial, and as the record reflects, the magistrate provided no opportunity to object. "I don't...need advice...so I didn't discuss this with you ahead of time", and that he wanted to talk to the jury "unaffected by the thoughts of attorneys." RT 21962. Attorneys are not required to engage in futile exercises. The bell had already been rung and the issue was raised at the first meaningful opportunity prior to appeal.

14/ That very "imputation" is compelled from the magistrate's remarks here: "Whoever is responsible for that kind of conduct [is] not being observant of the oath that you took to discharge your responsibility." RT 21961-2.

4. The verdict was not unanimous: Unless otherwise stipulated, a verdict in a civil case must be unanimous. Fox v. United States, 417 F.2d 84, 89 (2nd Cir. 1969); Rule 48 Fed.R.Civ.P. An "affidavit of a juror is admissible to show the true verdict or that no verdict was reached at all." Fox v. United States, supra, 417 F.2d at 89. The Ninth Circuit memorandum is contra (see Appendix) and is wrong.

It is appropriate for the trial court on motion for new trial to set aside the verdict where it appears that a juror, who seemingly agreed to the verdict before it was signed, in fact dissented therefrom. Id., see also Matisse v. Maryland Casualty Co., 5 F.2d 233, 234 (D.C.Wash. 1925).

In Fox, a juror was silent when polled. In the instant case, the juror expressly stated during the jury poll that "in order to get a unanimous vote" he had voted "yes". RT 21982. The Second Circuit held that

the trial judge had a duty to "eliminate all doubt as to whether the verdict of the jury is unanimous." 417 F.2d at 89. This is precisely what petitioners' counsel asked the magistrate to do on three occasions and he refused. RT 21984, 21985, 21986.

Where there is uncertainty or contingency as to the finality of a jury verdict, the legal effect is the same as if there had been no verdict. Sincox v. United States, 571 F.2d 876, 878 (1st Cir. 1978). The California Supreme Court has stated:

> Acquiescence simply because the verdict has been reached by the majority is not an independent judgment, and if permitted, would undermine the right to a unanimous verdict. People v. Superior Court, 67 Cal.2d 929, 932 (1967).

It is error to require a juror, after an ambiguous response, to make up his mind in open court. United States v. Sexton, 456 F.2d 961, 967 (5th Cir. 1972); see also Bruce v. Chestnut Farms-Chevy Chase Dairy,

126 F.2d 224, 225 (D.C. Cir. 1942) "The jury should be required to retire and give further consideration."

In United States v. Morris, 612 F.2d 483 (10th Cir. 1979), the court held:

> [I]n any case upon the appearance of any uncertainty or contingency in a jury's verdict, it is the duty of the trial judge to resolve that doubt, for "there is no verdict as long as there is any uncertainty or contingency to the finality of the jury's determination." 612 F.2d at 489, emphasis added.

The magistrate had the opportunity to resolve the ambiguity at a later point by conducting a hearing on that subject. Petitioners' motion for an evidentiary hearing (ER 64) was denied (ER 75). Post-trial evidentiary hearings requiring the attendance of jurors are allowed. Morgan v. United States, 399 F.2d 93, 97 (5th Cir. 1968) cert.denied 393 U.S. 1025 (1969); Remmer v. United States, 347 U.S. 227, 230-231 (1954).

5. Security Pacific National Bank's destruction of files and records: Security Pacific destroyed, altered and otherwise mishandled material evidence.[15/] The Ninth Circuit memorandum ignores this issue although expressly raised. (See Appendix, p.1, Issue No. 3).[16/] The point was also raised in the trial court in motions for judgment n.o.v. and new trial but a scheduled hearing on post-trial motions was annulled. F.R.Civ.P. 59, 60(b)(3).

A court may relieve a party from a final judgment, order, or proceeding for the fraud, misrepresentation, or other misconduct of an adverse party.

15/ This is within the purview of Sup.Ct. Rule 17.1(a) in that a federal court of appeals has so far departed from the accepted usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

16/ The point is presumably encompassed in the memorandum's closing paragraph. This issue, not lacking in merit, is pivotal, as the cited cases indicate.

Rule 60(b)(3) Fed.R.Civ.P., Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978); Atchison, Topeka & Santa Fe v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957); Toledo Scales Co. v. Computing Scales Co., 261 U.S. 399, 421 (1923).

The application of Rule 60(b)(3) does not require that the information withheld, or destroyed, be of such nature as to alter the result in the case and "a litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." Rozier v. Ford Motor Co., supra, 573 F.2d at 1346, citing Minneapolis St. Paul and S.S. Marie Rwy. Co. v. Moquin, 283 U.S. 530, 521-522 (1931). A party may prevail without showing that the alleged fraud affected the outcome of the trial. Wilson v. Thompson, 638 F.2d 801, 804 (5th Cir. 1981)

A defendant who destroys documents in

anticipation of litigation thereby rendering useless plaintiffs' attempt to obtain meaningful discovery is subject to sanctions. Alliance To End Repression v. The Rochford, 75 F.R.D. 438 (N.D.Ill. 1976)

> It has long been recognized that sanctions may be proper where a party, before a lawsuit is instituted, willfully places himself in such a position that he is unable to comply with a subsequent discovery order. Bowmar Instrument Corp. v. Texas Instruments, Inc., 25 Fed.R.S. 2d, 423, 427 (N.D.Ind. 1977). See also National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976).

Rule 26(e)(2) Fed.R.Civ.P. requires that when interrogatory responses are incorrect, there is a duty "seasonably to amend." None of the interrogatory responses were amended. See "Statement of Case," supra.

It was an abuse of discretion for the district court not to conduct a hearing on this issue and, having failed to do so, the court of appeals should have examined

the uncontradicted evidence and provided relief pursuant to Rule 60(b)(3). Fed.R.Civ.P.

6. Assertion of violation of the Glass-Steagall Act as an affirmative defense to bank counterclaims: First, the trial court should not have directed a verdict on the issue. ER 39. There was substantial uncontradicted evidence of a violation, accompanied by the bank's own admissions. See Pl.Ex.95-2. Appendix. Second, private litigants are entitled to assert a violation of Glass-Steagall as an affirmative defense. The latter is an "important question of federal law, which has not been, but should be, settled by this Court." Sup.Ct. Rule 17.1(c). A directed verdict should be granted only when the court can say "as a matter of law the evidence was capable of only one interpretation." Juhnke v. E.I.G. Corp.,

444 F.2d 1323, 1325 (9th Cir. 1971). The opposite was true here.

The purpose of the National Bank Act is to confine national banks to the exercise of only "such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. §24(7). Investment Company Institute v. Camp, 401 U.S. 617 (1971) In Camp, this Court citing the congressional record notes:

> Senator Glass made it plain that it was 'the fixed purpose of Congress' not to see the facilities of commercial banking diverted into speculative operations by the aggressive and promotional character of the investment banking business. 401 U.S. at 632.
>
> * * *
>
> Our great banking system was diverted from its original purposes into investment activities...the purpose of the regulatory provisions of this bill is to call back to the service of agriculture and commerce and industry the bank credit and the bank service designed by the

framers of the Federal Reserve Act. 401 U.S. at 633, n.29. 17/

Although "lending" is directly related to a national bank's express powers, it violates the act when it is integral to a relationship with a securities promoter and designed to increase bank profits by facilitating the

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17/ Security Pacific's internal memorandum (Pl.Ex.95-2) admits that the bank was engaged in acts prohibited by Glass-Steagall. The Security Pacific officer who prepared that document viewed the dangers of the bank's participation in the program in the same way as Congress and the Supreme Court perceived them, 401 U.S. at 633, but the bank for profit went ahead anyway and advanced another $9 million. The memorandum sets out three hazards that this Court considered the very evils prohibited by Glass-Steagall: (1) identification of the bank with the promoter in the mind of the borrower; (2) loans intended to "facilitate" a particular investment; and (3) loss of confidence, with the result that "disenchanted" customers would become litigants. The memorandum tracks this Court's recitation of congressional purpose as expressed in Camp: "There was also perceived the danger that when commercial banks were subject to the promotional demands of investment banking, they might be tempted to make loans to customers with the expectation that the loan would facilitate the purchase of stocks and securities." 401 U.S. at 631-632, emphasis added.

sale of securities to the general public, "notwithstanding that it may be convenient and useful in attracting customers who may also become depositors and borrowers." American Society of Travel Agents v. Bank of America, 385 F.Supp. 1084, 1087 (N.D.Cal. 1974), emphasis added.

In Board of Governors of the Federal Reserve System v. Investment Co. Institute, 450 U.S. 46 (1981), this Court reviewed the congressional purpose for Glass-Steagall and noted that the kind of bank services the Court was considering in that case were not significantly different from the traditional fiduciary functions of commercial banks, i.e., to manage the investment portfolio of customers in the form of trusts, estates, and agency accounts. 450 U.S. at 55. However, the extension of unsecured bank loans to promoter recruited customers for speculative investment purposes is not one

of the "traditional fiduciary functions of commercial banks".

This Court has not ruled upon the efficacy of either a private claim under Glass-Steagall or an affirmative defense to a Glass-Steagall violation. The sparse legal authority to date is to the effect that the Act does not give rise to a private damage claim. See Stein v. Galitz, 478 F.Supp. 517 (N.D.Ill. 1978); Russell v. Continental Illinois National Bank & Trust Co., 479 F.2d 131 (7th Cir. 1973). Here, however, the violation is asserted as an affirmative defense to enforcement of bank promissory notes. The notes facilitated the unlawful sale of unregistered securities and were integral to the banks' promotion of new business. See Pl.Ex.95-2, Appendix.

It is a general rule that a court will not allow recovery on an illegal contract. Hedla v. McCool, 476 F.2d 1223, 1227 (9th Cir. 1973). Where violative conduct undermines the purpose of legisla-

tion and congressional intent, the contract will not be enforced.

> [F]ederal public policy requires such annulment in order to secure observance, effectuate the legislative purpose, and prevent noxious consequences. General Life of Missouri Investment Co. v. Shamburger, 546 F.2d 746, 784 (8th Cir. 1976).

In Kaiser Frazier Corp. v. Otis & Co., 195 F.2d 838 (2nd Cir. 1962) cert.denied 344 U.S. 856 (1962), the court of appeals voided a contract which would not itself have been illegal because it was closely related to acts that were.

> [A] contract which violates the laws of the United States and contravenes the public policy as expressed in those laws is unenforceable...this is so, regardless of the equities as between the parties, for 'the very meaning of public policy is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone'...[W]e are satisfied that the contract was so closely related to the performance of acts forbidden by law as to be itself illegal." 195 F.2d at 844, emphasis added.

The promissory notes here were central to the banks' violation of Glass-Steagall.

Enforcement of these notes defeats congressional purpose and permits the banks to profit from their wrongdoing. A contractual obligation arising in the course of securities violations is "voidable when the purposes of the [securities] acts are thereby furthered." Byrnes v. Faulkner, Dawkins & Sullivan, 550 F.2d 1303, 1313 (2nd Cir. 1977). Conversely, if non-enforcement of a contract would frustrate legislative purpose, the contract will be enforced. A.C. Frost & Co. v. Cour D'Alene Mines Corp., 312 U.S. 38, 43 (1941):

> The ultimate issue is whether the result in the particular case would effectuate or frustrate the purpose of the act. Emphasis added.

See also Serzysco v. Chase Manhattan Bank, 290 F.Supp. 74, 90 (S.D.N.Y. 1968) aff'd 409 F.2d 1360 (2nd Cir. 1969) wherein the court barred the bank's enforcement of promissory notes because of violation of

Regulation U, margin requirements.[18/]

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

DATED: April 11, 1984.

Respectfully submitted,

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18/ Had these investment contracts been listed securities, all of the bank loans would have violated Regulation U. A suit to collect on the promissory notes would have been barred by illegality. "Under the provisions of 15 U.S.C.A. §77(c)(b)...contracts which are in violation of Regulation U are declared void." Serzysco v. Chase Manhattan Bank, 290 F.Supp. 74, 90 (S.D.N.Y. 1968), aff'd 409 F.2d 1360 (2d Cir. 1969). Regulation U was promulgated pursuant to the Securities Exchange Act of 1934, in part, to protect investors from excessive trading and relates to listed (and, therefore, registered) securities. It is illogical to hold that Congress intended to penalize commercial banks that illegally finance the purchase of listed securities, but gave carte blanche to banks that facilitate the sale of unlisted (and, here unregistered) securities. The former is within the purview of the securities acts, the latter within the purview of the National Bank Act.